APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-55160

D.C. No. CV-90-6449-R

UNITED STATES OF AMERICA,
Plaintiff,

v.

VISTA PAINT CORPORATION,
Defendant.

VISTA PAINT CORPORATION,
Counterclaimant-Appellant,

v.

UNITED STATES OF AMERICA,
Counterdefendant-Appellee.

VISTA PAINT CORPORATION,
Third-Party Plaintiff-Appellant,

v.

ENVIRONMENTAL PROTECTION AGENCY; SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT; SAN DIEGO AIR POLLUTION CONTROL DISTRICT; AIR RESOURCES BOARD; TECHNICAL REVIEW GROUP;
Third-Party Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, Chief District Judge, Presiding

Argued and Submitted August 19, 1992
Pasadena, California

MEMORANDUM*

[Filed Sep. 24, 1992]

Before: TANG and HALL, Circuit Judges, and WALKER,** District Judge.

Vista Paint Corporation ("Vista") appeals from the district court's summary judgment in favor of the government finding Vista liable for violations of the Clean Air Act ("CAA") and awarding the United States ("USA") civil penalties and attorneys fees. Vista also appeals the dismissal of its counterclaims and third-party complaint against the Environmental Protection Agency ("EPA"), California Air Resources Board ("ARB"), South Coast Air Quality Management District ("SCAQMD"), and San Diego Air Pollution Control District ("SDAPCD").

The district court had jurisdiction over the enforcement action pursuant to 42 U.S.C. § 7413(b) and 28 U.S.C. §§ 1331, 1345, and 1355. Jurisdiction over the third-party complaint and counterclaim was disputed. We have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 1291. We affirm in part, reverse in part, and remand this action to the district court.

I.

Vista contends that the district court erred in granting motions striking certain of Vista's affirmative defenses and

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The Honorable Vaughn R. Walker, United States District Court Judge for the Northern District of California, sitting by designation.

dismissing Vista's counterclaims and third-party claims for want of subject matter jurisdiction and for failure to state a claim.

A. Invalidity claims and defenses.

As Vista had ample opportunity to submit comments on the inclusion of the local rules in the California state implementation plan ("SIP") pursuant to section 307(d) of the CAA, and to challenge EPA's approval of the inclusion of those rules in the SIP pursuant to section 307(b)(1) of the CAA, the district court lacked subject matter jurisdiction over the third-party complaint, the counterclaim, and the affirmative defenses dealing with invalidity.

B. Estoppel claims and defenses.

Assuming that there was jurisdiction over the estoppel claims and defenses, the district court correctly dismissed these claims and defenses for failure to state a claim. Even if the EPA had promised not to exercise its enforcement discretion against those paint manufacturers who ceased sales of non-complying paint by September 1, 1987, and that promise was sufficient to estop EPA, Vista admits that it did not halt the sale of non-complying paint by that date. Accordingly, any "promise" would be inapplicable to Vista and it could not prevail on its estoppel theory as a matter of law.[1] Accordingly, the district court properly dismissed the claims and defenses based on estoppel for failure to state a claim.

II.

Vista also contends that the district court erred in finding that Vista violated the CAA by selling or offering

[1] Vista also argues that USA is estopped due to "EPA's variance representations." However, Vista did not raise this argument until its post-judgment motion. *See infra* Section IV.

for sale non-complying paint, and by refusing to comply with EPA's information request.

A. Paint sale liability.

There was no genuine factual dispute precluding summary judgment as to Vista's liability for selling or offering for sale non-complying paint. Vista was manufacturing, selling and offering for sale non-complying coatings in 1985 when the volatile organic compounds ("VOC") limits became effective. In June 1987, Vista told EPA that it was selling non-complying paint in the SCAQMD and the SDAPCD. In his deposition, Vista's President, Eddie Fischer, admitted that Vista had been violating the rules since 1985 and was doing so before and after September 1, 1987. Vista also admitted that these violations in the SDAPCD continued until October 12, 1987.

Vista did not raise the issue that the dates of the sales were not proved for Sundays and holidays until after summary judgment had been entered. In his declaration in opposition to summary judgment, Fischer denied that Vista offered for sale thousands of gallons of non-complying paint. However, Fischer expressly testified in his deposition that non-complying paint was offered for sale after September 1, 1987, in San Diego. A party may not recant sworn testimony in order to defeat a summary judgment motion. *Juardo v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1410 (9th Cir. 1987). Accordingly, as no issue of fact or law remained, summary judgment as to liability for non-complying paint sales was proper.

B. Compliance with information request.

There was no genuine factual dispute precluding summary judgment as to Vista's liability for refusing to comply with EPA's information request. EPA's second information request required Vista to establish and maintain certain records and to submit certain reports. Vista's

President admitted that the kind of information EPA sought was available when EPA requested it. If Vista had stopped offering for sale and selling non-complying paint by September 1, 1987, it would have been relieved of some of the requirements in this request. However, Vista continued to sell such paint after September 1, 1987. Vista's President understood that the requirements of the second request were waived only if Vista stopped selling non-complying paint by September 1, 1987. Although Vista admittedly continued to sell non-complying paint after September 1, 1987, it never provided the information requested by EPA. Accordingly, the court did not err in granting summary judgment as to liability for Vista's refusal to comply with EPA's information request because no issue of fact or law remained.[2]

III.

Vista also contends that the district court erred in summarily awarding civil penalties. Due to the factual nature of many of the factors the district court was required to consider in determining the civil penalty, summary judgment was improper. Section 113(e)(1) of the Clean Air Act requires that:

> In determining the amount of any penalty to be assessed under this section . . . the Administrator or the court, as appropriate, shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same

[2] Vista's argument that the EPA had no authority to require the sales data and that it had sufficient cause to act as it did were only raised in its post-judgment motion. *See* Section IV.

> violation, the economic benefit of noncompliance, and the seriousness of the violation.

42 U.S.C. § 7413(e)(1) (1992 Supp).[3]

A. Section 113(e)(1) factors.

1. economic impact/size of business

In opposition to summary judgment, Vista asserted that there was a genuine factual dispute as to the economic impact of the penalty on Vista's business. The court below specifically noted in its findings:

> Vista is a major manufacturer, distributor and retail seller of paint with its total sales last year exceeding 50 million dollars. . . . Imposition of the penalty assessed below would amount to approximately six percent of Vista's sales in a single year of operation.

In his declaration, Fischer stated that Vista's overall sales for fiscal 1991 were about "$45 million and profits were approximately two million dollars. Since then, sales have been flat but profits have declined." In addition, Fischer declared that "[i]mposition of the fine sought by the government in this case, would result in the destruction of my business and the loss of 400 number of jobs [sic] in the Southern California area." USA contends that Fischer's statements did not give the court any financial information to help the court make its determination. While Vista presented no business records, tax returns, affidavits of accountants to controvert the USA claim that the imposition of the full amount of the penalty would amount to less than eleven percent of Vista's sales in one year, Fischer's declarations raise a genuine issue of materail fact. Accordingly, the court erred in granting summary judgment as to this penalty factor.

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[3] The 1990 Amendments became effective on November 15, 1990. USA filed its complaint on December 3, 1990. Accordingly, the Amendments apply to this case.

2. full compliance history

The district court held that despite Vista's history of full compliance, a substantial penalty was warranted. As there was no factual dispute, summary judgment as to this factor was proper.

3. good faith efforts to comply

In opposition to summary judgment, Vista asserted that there was a genuine factual dispute as to its state of mind. A court should be wary of granting summary judgment when good faith is in question. *See White v. Roper,* 901 F.2d 1501, 1503-06 (9th Cir. 1990); *Hotel & Restaurant Employees Union v. Rollison,* 615 F.2d 788, 793 (9th Cir. 1980). In his declaration, Fischer stated that Vista made every attempt to cooperate with the EPA. USA contends that there are no *material* facts in dispute regarding good faith. However, the mere fact that Vista offered for sale and sold non-complying paint after September 1, 1987, does not establish that Vista acted in bad faith.[4] As there was a genuine issue of material fact, sumary judgment was improper as to this factor.

In addition, the court erred in summarily finding that Vista acted in bad faith in failing to respond to the information request. In his declaration, Fischer stated that Vista attempted at all times to cooperate with the government's request. Fischer also stated that three Vista employees spent three days trying to compile the requested

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[4] At summary judgment, Vista argued that the issue of state of mind was "relevant to the seriousness of any violation." As good faith is irreleavnt as to the seriousness of the violations, the court correctly refused to consider good faith under that factor. Vista did not argue that its state of mind was relevant to its good faith efforts to comply. This error is likely due to the failure of USA to bring its complaint under the 1990 CAA Amendments. As good faith is a factor that the district court was required to consider, summary judgment as to this issue was not proper.

data. There were contested issues of material fact.[5] Vista's good faith was a question of fact that should not have been decided on summary judgment.

4. duration of violation

The district court correctly ruled that the duration of violation supported a substantial penalty. Vista's argument that any violation occurred only on the day of the deadline, but did not continue thereafter, is meritless. The CAA explicitly provides for penalties for each day that Vista fails to respond to an information request. 42 U.S.C. § 7413(b) (1992 Supp).

5. payment of penalties previously assessed

SDAPCD previously assessed a $500 penalty. Vista argues that the court "appears to have given no weight to SDAPCD's evaluation of the proper penalty." This argument is meritless. The district court was not obligated to accept $500 as the proper penalty. The district court considered the $500 Vista paid to the SDAPCD on a fine originally set at $2,000.

6. economic benefit of noncompliance

The district court found that Vista obtained a "significant economic benefit" that supported a "substantial penalty." While there may have been a factual dispute as to this issue, the district court recognized that "Vista has improperly failed to disclose information which it has or had in its exclusive possession to assess the precise economic benefit to it due to its illegal offer for sale and sale of non-compliant coatings." The court also found that

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[5] Vista's contention that EPA's "promise" that any deficiencies in Vista's responses would excite "immediate" action, and its settlement letter that told Vista that EPA had "enough information to make a settlement offer," led Vista to believe that it had satisfied the information request, was not raised until the post-judgment motion.

Vista failed to submit admissible evidence to controvert USA's showing of Vista's significant economic benefit. Therefore, summary judgment was proper as to this penalty factor.

7. seriousness of the violation

The court found that the seriousness of the violation supported a substantial penalty. In opposition to summary judgment, Vista asserted that there was a genuine factual dispute as to the effects of its emissions on human health. The only document filed by Vista in opposition to summary judgment was a declaration by Fischer. Vista offered no documentary evidence related to the quantity of paint offered for sale to controvert the government's claims as to the potential health effects of the 13,000 gallons of paint it alleged Vista had offered for sale in San Diego in September 1987. USA contends that its claim was based on Fischer's sworn testimony before the San Diego Hearing Board that he had "13,000 gallons of paint in the San Diego district."

In its opposition, Vista represented that it had only sold 34 gallons of paint in September 1987 in the SDAPCD. But, in his supporting declaration, Fischer estimates that Vista sold at least 70 gallons. Fischer's declaration raises a genuine factual dispute as to the number of gallons offered for sale. Therefore, this element of the seriousness factor was not properly disposed of on summary judgment.

Vista also argues that any delay or lack of completeness in providing the 1987 sales data had no adverse impact on the public. This argument is meritless. EPA's ability to gather information on potential violations is vital to enforcement of the CAA. It is irrelevant that no ozone was formed from Vista's failure to supply the information. *See United States v. Charles George Trucking Co.*, 823 F.2d 685, 689 (1st Cir. 1987) (importance of compliance with information requests).

B. Non-statutory factors.

1. governmental delay

In opposition to summary judgment, Vista asserted that there was a genuine factual dispute as to the effect of EPA's inaction on the district's proposed SIP revisions. In *General Motors Corp. v. United States,* 496 U.S. 530, 541 n.4 (1990), the Supreme Court found that "the statutory remedies for EPA inaction include . . . a request pursuant to § 113(b) . . . for reduction or elimination of penalties during any period in which unreasonable agency delay results in prejudice." *See also United States v. SCM Corp.,* 667 F. Supp. 1110, 1128 (D. Md 1987) (government delay should neither mitigate against imposition of a substantial penalty nor act to enhance the penalty amount). Vista made such a request at summary judgment.

Vista argues that EPA delayed from 1985 to 1987 in notifying the industry that it would attempt to enforce the federally approved, but locally superseded, rules. Vista also argues that the district court failed to properly consider EPA's delay in acting on the proposed SIP revisions and in bringing this action. Vista contends that had the EPA rejected the revisions earlier, it would have made none of the paint sales. The "mere failure by governmental agencies to prosecute . . . does not allow a court to reduce a penalty." *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals Inc.,* 913 F.2d 64, 81 (3rd Cir. 1990). EPA is only required to act on revisions of SIPs within a reasonable time, not necessarily within four months. *General Motors Corp.,* 496 U.S. at 536-42. USA contends that the EPA's inaction on the San Diego proposed revision was reasonable as it was submitted less than a month before September 1, 1986. Whether this and the other delays were reasonable was a question of fact that precluded summary judgment as to this factor.

2. unusual and perplexing nature of regulation

Vista did not bring up this argument until its post-judgment motion. Vista cites only *United States v. Louisiana-Pacific Corp.*, 682 F. Supp. 1122 (D. Colo. 1987), to support its argument that its penalty should have been reduced because of the "unusual and perplexing" nature of the regulatory scheme. Whatever the complexity of the underlying legal basis for EPA's actions, Vista's President was told by EPA and the San Diego District that, if it did not stop selling non-complying paint by September 1, enforcement would follow. There was nothing unusual or perplexing in these instructions to Vista.

3. reliance

This argument was brought forth in Vista's post-judgment motion. The district court was not bound by *Louisiana-Pacific* to consider "justifiable and detrimental reliance." Accordingly, the court did not abuse its discretion in denying the post-judgment motion as to this issue.

IV.

Unfortunately, Vista intertwined the distinct issues addressed on summary judgment with those addressed only in its post-judgment motion.[6] Vista never expressly argued in its opening brief that the district court erred in denying its post-judgment motion. Even in its reply brief, Vista's arguments were, at best, unclear. Vista did not even touch on any of these arguments in its opening brief. Accordingly, we refuse to consider these arguments.

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[6] After thorough review of the district court record, we conclude that the following issues were raised for the first time in Vista's post-judgment motion: Vista's liability for pre-notice of violation sales, the burden of proof regarding the dates of any sales, abuse of prosecutorial discretion, USA's failure to follow EPA's penalty policy, constitutional excessiveness, EPA's authority to require the sales data, and Vista's sufficient cause to act.

V.

We affirm the district court's decision to grant motions striking certain of Vista's affirmative defenses and dismissing Vista's counterclaims and third-party claims for want of subject matter jurisdiction and for failure to state a claim. We also affirm the district court's summary judgment as to liability, and its denial of Vista's post-judgment motion. However, we reverse the district court's summary judgment as to the civil penalty, and remand to the district court for trial on the penalty issues.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 90-6449(R)

UNITED STATES OF AMERICA,
Plaintiff,

v.

VISTA PAINT CORPORATION,
Defendant.

VISTA PAINT CORPORATION,
Counterclaimant,

v.

UNITED STATES OF AMERICA,
Counterdefendant.

VISTA PAINT CORPORATION,
Third Party Plaintiff,

v.

ENVIRONMENTAL PROTECTION AGENCY; CALIFORNIA AIR RESOURCES BOARD; TECHNICAL REVIEW GROUP; SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT; SAN DIEGO AIR POLLUTION CONTROL DISTRICT,
Third Party Defendants.

ORDER DISMISSING DEFENDANT'S COUNTERCLAIM, DISMISSING DEFENDANT'S THIRD PARTY COMPLAINT, AND STRIKING CERTAIN AFFIRMATIVE DEFENSES

[Filed July 23, 1991]

The motion of plaintiff United States of America to dismiss defendant Vista Paint Corporation's counterclaim and to strike certain affirmative defenses in this action, and the motions of the third party defendants, Environmental Protection Agency, California Air Resources Board, Technical Review Group, South Coast Air Quality Management District and San Diego Air Pollution Control District, to dismiss defendant's third party complaint in this action, came on regularly for hearing before this Court on June 17, 1991. Appearing on behalf of the plaintiff United States of America and third party defendant Environmental Protection Agency were Stephen M. Johnson and Peter Hsiao. Appearing on behalf of the third party defendant South Coast Air Quality Management District was Barbara Baird. Appearing on behalf of the third party defendant San Diego Air Pollution Control District was Miriam Milich. Appearing on behalf of the third party defendants Technical Review Group and California Air Resources Board was Norman N. Flette. Appearing on behalf of the defendant and third party plaintiff was William H. Smiland. After considering the moving and opposition papers, the arguments of counsel and all other matters presented to the Court;

IT IS HEREBY ORDERED that:

1. The motions of the third party defendants Environmental Protection Agency, South Coast Air Quality Management District, San Diego Air Pollution Control District, California Air Resources Board and Technical Review Group to dismiss defendant Vista Pain Corporation's third party complaint are granted in their entirety and the third party complaint is dismissed with prejudice with respect to all third party defendants based upon the following grounds:

a. The Court lacks subject matter jurisdiction to review the claims raised in the third party complaint;

b. The claims asserted by the defendant in the third party complaint fail to state a claim upon which relief can be granted.

2. Plaintiff United States of America's motion to dismiss defendant's counterclaim is granted in its entirety and the counterclaim is dismissed with prejudice based upon the following grounds:

a. The Court lacks subject matter jurisdiction to review the claims raised in the counterclaim;

b. The claims asserted by the defendant in the counterclaim fail to state a claim upon which relief can be granted;

3. Defendant's First through Sixth, Eighth, Twelfth, Thirteenth, and Fifteenth through Eighteenth purported affirmative defense, inclusive, are stricken in their entirety.

DATED: This 23rd day of June, 1991.

/s/ Manuel L. Real
MANUEL L. REAL
Chief United States District Judge

Submitted by:

LOURDES G. BAIRD
United States Attorney
SCOTT H. PARK
Assistant United States Attorney

/s/ Peter Hsiao Date 6-21-91
PETER HSIAO
Assistant United States Attorney
Attorneys for Plaintiff United States of America and Third Party Defendant Environmental Protection Agency

PETER M. GREENWALD
District Counsel

/s/ Peter Hsiao/a Barbara Baird Date 6-21-91
BARBARA BAIRD
by telephone authorization
Principal Deputy District Counsel
Attorneys for Third Party Defendant South Coast Air Quality Management District

LLOYD M. HARMON, JR.
County Counsel

/s/ Peter Hsiao/a Miriam Milich Date 6-21-91
MIRIAM MILICH, Deputy
by telephone authorization
Attorneys for Third Party Defendant San Diego Air Pollution Control District

DANIEL E. LUNGREN
Attorney General
R. H. CONNETT
Assistant Attorney General

/s/ Peter Hsiao/a Norman Flette Date 6-21-91
NORMAN N. FLETTE
by telephone authorization
Deputy Attorney General
Attorneys for Third Party Defendants Technical Review Group and California Air Resources Board

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CV 90-6449-R

UNITED STATES OF AMERICA,
Plaintiff,

v.

VISTA PAINT CORPORATION,
Defendant.

Date: November 18, 1991
Time: 10:00 a.m.

[Filed Dec. 18, 1991]

The Motion for Summary Judgment brought by plaintiff United States of America came on regularly for hearing on November 18, 1991, Chief United States District Judge Manuel L. Real Judge Presiding. Peter Hsiao, Assistant United States Attorney appeared on behalf of the United States. Robert Newell appeared on behalf of defendant Vista Paint Corporation ("Vista"). After considering the pleadings filed herein, the papers and accompanying documents, declarations and exhibits, and in accordance with Plaintiff's Statement Uncontroverted Facts and Conclusions of Law filed and entered concurrently herewith, and there being no genuine issue of material fact remaining in dispute;

IT IS HEREBY ORDERED AND ADJUDGED that:

(1) The motion for summary judgment brought by plaintiff United States of America is granted in all respects;

(2) Judgment is granted to the United States of America and against defendant Vista for Vista's violation of Section 110 of the Clean Air Act pursuant to 113 of that Act, 42 U.S.C. §§ 7410, 7413, for 578 days. Civil penalties are accordingly assessed against Vista:

(a) for Vista's 468 days of violation from December 3, 1985 up to June 24, 1987 in the amount of $1000.00 per day of violation for a total of $468,000.00; and

(b) for Vista's 110 days of violation from June 24, 1987 to October 12, 1987 in the amount of $12,500.00 per day of violation for a total of $1,375,000.00;

(3) Judgment is granted to the United States of America and against defendant Vista for Vista's violation of Section 114 of the Clean Air Act pursuant to Section 113 of that Act, 42 U.S.C. §§ 7413, 7414, for 1177 days from August 26, 1987 to November 18, 1991, and civil penalties are accordingly assessed against Vista for these violations in addition to the above stated penalties in the amount of $1000.00 per day of violation for a total of $1,177,000.00.

(4) The United States of America is awarded its reasonable attorney fees and expenses for establishing that Vista's responses to the United States' requests for admissions were without a legally justifiable reason. Plaintiff shall submit its declaration establishing its attorney fees and other expenses within twenty-one (21) days of this judgment.

(5) The United States of America is awarded its costs of suit against Vista. The United States shall submit its cost bill within twenty-one (21) days of this Order.

(6) The United States of America is awarded interest at the legally applicable rate of 4.98 per cent as of this date on the entire judgment amount herein, to begin accruing as of the date this judgment is entered.

DATED: This 18th day of Dec., 1991.

/s/ Manuel L. Deal
MANUEL L. DEAL
Chief United States District Judge

Presented by:

LOURDES G. BAIRD
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division
SCOTT H. PARK
Assistant United States Attorney

/s/ Peter Hsiao
PETER HSIAO
Assistant United States Attorney

Attorneys for Plaintiff
United States of America

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CV 90-6449-R

UNITED STATES OF AMERICA,
Plaintiff,

v.

VISTA PAINT CORPORATION,
Defendant.

Date: November 18, 1991
Time: 10:00 a.m.

STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW IN SUPPORT OF UNITED STATES' MOTION FOR SUMMARY JUDGMENT

[Filed Dec. 18, 1991]

Plaintiff United States of America's motion for summary judgment came on regularly for hearing on September 16, 1991, Chief United States District Court Judge Manuel L. Real presiding. After having heard the arguments of counsel and examined the pleadings, memorandum and exhibits presented by the plaintiff and defendants, the Court makes the following findings of fact and conclusions of law:

STATEMENT OF UNCONTROVERTED FACTS

1. Vista is a major manufacturer, distributor and retail seller of paint. It manufactures approximately 25,000 gallons of paint each month for sale at its stores in California, and its total sales last year exceeded 50 million dollars. Vista's general office and its sole paint manufacturing plant are located in Fullerton, California. Vista sells its paint at its own stores in Stanton, Costa Mesa, La Habra, Orange, Mission Viejo, Ontario, Riverside, El Cajon, Chula Vista, Huntington Beach, and San Diego, California.

2. In 1984, as part of the State Implementation Plan ("SIP") for California to limit the VOC content of paint, the South Coast Air Quality Management District ("SCAQMD") and the San Diego County Air Pollution Control District ("SDCAPCD") adopted SIP Rules 1113 and 67.0. These rules regulate non-flat architectural coatings, otherwise known as gloss or semi-gloss paints, which are commonly used to paint structures, mobile homes or pavement. In order to control air pollution from the manufacture and application of these coatings, the rules limit their VOC content to no more than 250 grams of VOC per liter of coating ("250 g/l VOC"), and forbid the sale, offer for sale, or application of any such paint exceeding these VOC limitations ("non-compliant coatings").

3. As background, local and regional government authorities under California law have primary responsibility for control of air pollution. Cal. Health & Safety Code § 40000 *et seq.* Two of these local authorities are the SCAQMD, which includes Los Angeles and Orange Counties, and the SDCAPCD, which includes San Diego County. These districts are empowered to adopt rules governing air pollution and to independently enforce them as state law. *Id.* at § 40001. As for the federal government, the Clean Air Act ("CAA") provides the EPA

with independent authority to enforce federally approved air pollution control laws. Section 110 of the Act, 42 U.S.C. § 7410, requires among other things that each State submit rules for emission limitations to be incorporated into the State Implementation Plan ("SIP"), and enforced as federal law by the EPA. *See* 42 U.S.C. § 7413.

4. In 1985, the U.S. Environmental Protection Agency ("EPA"), pursuant to the CAA, approved SCAQMD Rule 1113 and SDCAPCD Rule 67.0 as part of the SIP for California, to be enforced as federal law. 50 Fed. Reg. 3338 (January 24, 1985).

5. Vista's president was aware of these rules and their purpose in the time period between 1985 to 1987, to control VOC emissions. Vista was both a long-time manufacturer and seller of non-compliant coatings, having produced its "Trim-Kote" and "Proformer" brands with VOC's in excess of 250 g/l for over 10 years. Vista offered these non-compliant coatings for sale for the five-year period preceding February 1987.

6. EPA met with industry trade associations in 1987, including the National Paint & Coatings Association and the Southern California Paint & Coatings Association, regarding its strategy for taking enforcement action against companies violating the 1985 VOC limitations set by law. EPA informed the industry that it would, as a matter of enforcement discretion, prioritize enforcement against those companies that did not cease the manufacture of non-compliant coatings by July 1, 1987 *and* who did not cease their sale of non-compliant coatings by September 1, 1987. Thus, while EPA retained the discretion to prosecute any company that violated the VOC limitation after January 24, 1985, EPA announced that those companies that persisted longest in their continuing violations of the Clean Air Act would be the first to be prosecuted.

7. On March 19, 1987, in order to determine the compliance status of the paint industry with the VOC limitations of federal law, EPA issued a request for information to a number of paint manufacturers, including Vista, pursuant to Section 114 of the CAA, 42 U.S.C. § 7414 ("Section 114 Request"). EPA required that each company report the volume of each non-architectural coating that it manufactured from February to May 1987, and the VOC content of each coating. Each company was given until April 7, 1987 to submit their first reports, and warned that non-compliance would subject them to civil penalties.

8. Vista did not respond to EPA's March 19 request. Vista's president cannot recall why Vista did not respond. Faced with Vista's recalcitrance, EPA subsequently issued an Administrative Order against Vista pursuant to Section 113(a)(3) of the CAA, finding that Vista had violated Section 114 of the CAA in failing to provide the requested information to EPA. 42 U.S.C. §§ 7413(a)(3), 7414. Per its Order, EPA directed Vista to disclose by no later than April 16, 1987 the VOC content of the architectural coatings that it manufactured or distributed from February through May 1987.

9. Vista only partially complied with EPA's Administrative Order, responding in a letter postmarked April 20, 1987 by disclosing the VOC content of the architectual coatings it manufactured in February and March 1987, only. Vista's letter disclosed that its monthly paint production was approximately 25,000 gallons of coatings, with 55 percent by volume of the identified coatings exceeding the 250 g/l VOC limitation of federal law. Vista did not respond to EPA's Order regarding its coatings manufactured in April and May, 1987, and did not provide the requested information.

10. EPA subsequently sought more specific information from the paint manufacturers regarding the trade

name, volume and VOC content of each non-compliant coating sold in each California air quality district in March, April and May 1987. On May 15, 1987, EPA sent Vista a modified request for more specific information to supplant its initial request for information. Alternatively, EPA specified that the paint manufacturer could stipulate that it sold and/or offered for sale coatings in violation of the 250 g/l VOC limitation, and the month and location where the non-compliant paint was sold. Vista was advised that a failure to provide the requested information would subject Vista to an enforcement action for civil penalties of $25,000 per day of violation.

11. Vista responded by a letter dated June 12, 1987. Without disclosing the months in which it sold non-compliant coatings, Vista admitted to selling non-compliant coatings in the SCAQMD and the SDCAPCD. Vista's president also confirmed Vista's prior admissions in his sworn deposition testimony. Yet the information regarding the volume of each such non-compliant Vista coating sold and the location of their sale was available to Vista in March, April and May of 1987.

12. Based upon Vista's admission, EPA issued a Notice of Violation to Vista on June 19, 1987 pursuant to Section 113(a)(1) of the CAA.

13. EPA, in its continuing effort to compel Vista to comply with the law, sent Vista a second Section 114 request on June 19, 1987, requesting documentation of any quantities of Vista non-compliant coatings manufactured and sold in the subsequent July-October 1987 period. This request required Vista to (1) establish and maintain records regarding their non-compliant coatings, (2) report the volume of non-compliant coatings sold in August-October 1987 and their location of sale; (3) report the name and VOC content of the coatings sold; and (4) report the identity of coatings manufactured by Vista from July-October 1987.

14. The information requested by EPA's June 19 Section 114 request was available to Vista at the time of EPA's request. EPA again warned Vista at that time of the a $25,000 per day penalty if the requested information was not received.

15. In an effort to further accommodate the paint industry and Vista, EPA by its letter dated July 22, 1987 modified its second Section 114 request with a strictly tailored condition. In this letter, EPA stipulated that if Vista would commit to (1) the cessation of the manufacture of non-compliant coatings by July 1, 1987, (2) the cessation of all sales of non-compliant coatings by September 1, 1987 (a condition never fulfilled by Vista, see below), and (3) disclose the time and location of sales of non-compliant paint in August 1987 (another condition never fulfilled by Vista), that Vista would be relieved of its obligation to provide the other information requested by EPA in its prior June 1987 letter. Vista was still required to maintain all relevant records of its manufacture and sale of non-compliant coatings. EPA was explicit, however, that all conditions must be strictly complied with if Vista was to be relieved of any of its reporting obligations.

16. Vista continued to manufacture, sell and offer for sale its non-compliant coatings throughout April to October 1987, but did not provide any reports to EPA. Vista continued to manufacture non-compliant coatings in April, May and June of 1987, and continued to sell and offer for sale its non-compliant coatings in the Los Angeles and San Diego areas throughout June, July, August and September 1987. Although Vista continued to sell non-compliant coatings, Vista submitted no report of its August sales as requested in EPA's July 22, 1987 letter, and no report as required by EPA's June 19, 1987 letter. 24. EPA, per the CAA Section 113, 42 U.S.C. § 7413, gave notice to the appropriate State air pollution control agency of this enforcement action.

17. On August 19, 1987, Vista's president, Eddie R. Fisher, telephoned William Wruble of EPA Region IX to ask for more time to sell his non-compliant coatings. After discussing Vista's situation, Mr. Fisher stated that "he had no choice but to sell the [non-compliant] paint past September 1, and was planning to do so." Mr. Fisher then stated that "he would (could) litigate if he had to, since the option was to go out of business."

18. Mr. Wruble denied Vista's request for additional time to sell its non-compliant coatings, and explained that Vista's failure to take EPA's enforcement authority seriously was not a reason to grant it additional time to sell non-compliant coatings. Mr. Fisher then said that he "didn't think it was our [EPA's] intention to put him in jail, although he'd be willing to pay a 'reasonable' fine to be able to continue to sell his violating coatings."

19. Vista was also warned by the local SDCAPCD to cease its sale of non-compliant coatings by September 1, 1987, a warning Vista received at least by July 28, 1987. Vista however continued to sell non-compliant coatings throughout September 1987. Vista admits that such non-compliant coatings remained offered for sale throughout Vista's San Diego stores in September 1987. Vista also continued its refusal to respond to EPA's request for information.

20. Further evidence that Vista sold non-compliant coatings after September 1, 1987 is provided where inspectors from the SDCAPCD purchased the Vista-brand "Trim-Kote" coating, a non-compliant coating, from Vista's retail outlet on Kearney Villa Road in San Diego, California, on September 2, 1987. The SDCAPCD's laboratory analysis revealed that the purchased paint had a VOC concentration of 387 g/l, well above the permissible 250 g/l permitted by SDCAPCD Rule 67.

21. The SDCAPCD inspectors purchased a second gallon of non-compliant coating, a Vista paint under the

brand name "Proformer", from the same Vista San Diego store on September 22, 1987. The SDCAPCD's laboratory analysis revealed that the purchased paint had a VOC concentration of 381 g/l, well above the permissible 250 g/l permitted by SDCAPCD Rule 67.

22. Both Vista's records and its president corroborate these violations. Vista's April 16, 1987 report to EPA identifies that its "Trim-Kote" and "Proformer" paints as non-compliant coatings, have a VOC concentration of 340 and 380 g/l, respectively. Vista's president confirmed that Vista's "Trim-Kote" and "Proformer" paints purchased by the SDCAPCD inspectors would be expected to have VOC concentrations in excess of 250 g/l. Mr. Fisher further admits that non-compliant coatings were sold in San Diego on September 2, 1987. Based upon these illegal sales, the SDCAPCD cited Vista with two misdemeanor Notices of Violations for its violations of SDCAPCD Rule 67. Cal. Health & Safety Code § 42400.

23. Faced in September 1987 with enforcement action from the SDCAPCD (EPA had not yet taken its enforcement action against Vista), Vista sought a variance from the SDCAPCD Hearing Board.

24. As background, the variance procedure is a creation of the California Health & Safety Code §§ 42350 *et seq.*, and provides the applicant with a procedure to obtain relief from a *local* rule (not a federal rule) under certain strictly limited conditions. Cal. Health & Safety Code § 42350. In part, an applicant cannot obtain a variance unless the applicant attests that it "is, or will be, in violation of Section 41701 or of any rule, regulation, or order of the district." Cal. Health and Safety Code § 42352(a). Thus, by applying for a variance, Vista further admitted that it was in violation of SDCAPCD Rule 67 and/or its intent to violate that Rule for the express purpose of selling the remainder of Vista's non-compliant paints within the next 90 days.

25. Vista was subsequently unable to persuade a majority of the SDCAPCD Hearing Board at its September 24, 1987 hearing that a variance was warranted, and Vista obtained no variance relief at any time from the SDCAPCD. Vista applied to the SDCAPCD Hearing Board for reconsideration, then dropped its request. Vista represented instead that it had removed its non-compliant paint from its San Diego stores as of October 12, 1987, but after the September 24 variance hearing. Vista's president explains that he removed the non-compliant coating from his San Diego stores because those coatings were not selling well. Vista subsequently paid a fine to the SDCAPCD for its violations of their local rules.

26. Vista offered for sale a significant amount of non-compliant coatings in San Diego in September 1987. At the SDCAPCD Hearing Board September 24, 1987 hearing, Vista's president testified under oath, as required by Cal. Health & Safety Code § 40830, that 13,000 gallons of non-compliant paint remained in Vista's San Diego stores. Vista's president corroborated this admission when he told SDCAPCD inspector George Seidel prior to the hearing that during September 1987, Vista had 5200 gallons of non-compliant paint for sale in Vista's San Diego stores. Until Vista's variance was lost, Vista continued to offer this paint for sale in violation of the SIP.

27. The VOC's emitted by Vista's paint are a primary percursor of ozone, or smog, which the EPA has designated as a major air pollutant. 42 U.S.C. §§ 7408, 7450, 7451; 40 C.F.R. ¶¶ 50.1, 50.9. The 13,000 gallons of coating offered for sale in September 1987 in San Diego by Vista would release approximately eight tons of VOC hydrocarbons.

28. Ozone pollution causes serious adverse health effects, including coughing, reduced lung capacity, respiratory infection and possible permanent lung damage. There is also evidence that the young, the elderly, and those persons with respiratory ailments (such as asthmatics) are

among those who are particularly susceptible to the adverse effects of ozone. At certain concentration levels, ozone irritates the respirator system and causes coughing, wheezing, chest tightness and headaches. Due to its irritation nature, ozone can aggravate asthma, bronchitis, and emphysema. Some studies indicate that chronic exposure to fairly low levels of ozone may reduce resistance to infection and alter blood chemistry or chromosome structure. At higher concentrations [of ozone], hospitalization becomes a possibility.

29. Ozone also causes significant damage to the environment, where ozone can destroy vegetation, reduce crop yield, and damage exposed materials by causing cracking, fading, and weathering. Moreover clear evidence shows that ozone damages economically, ecologically, and aesthetically important plants. When exposed to ozone, major annual crops produce reduced yields. Some tree species suffer injury to needles or leaves, lowered productivity, and in severe cases, individual trees can die.

30. EPA has through the federal Clean Air Act attempted to control and regulate VOC emissions from a variety of sources, including paint manufacturers. In 1987, EPA found that 40 paint companies, including Vista, were in violation of the federal Clean Air Act's limitation on VOC concentrations in their coatings. All 40 paint companies received a Notice Of Violation, and 38 announced their intent to cease non-compliant paint sales. Only one company announced its intent to contiue to violate the VOC restrictions, to intentionally violate the law despite repeated warnings from the regulatory agencies, and to disregard the effects of its violations on human health and the environment: that company was Vista.

31. After EPA referred this matter to the U.S. Justice Department for enforcement action, Vista for the first time produced a letter it purportedly prepared on or about August 4, 1987 and sent to EPA, that represented that

Vista had ceased its manufacture of non-compliant coatings on June 30, 1987, and "will not offer for sale any non-compliant coatings after September 1, 1987."

32. This representation has in fact proven to be false. Vista's president admits that sales of such coatings continued well after September 1, 1987. In addition, there is no copy of the letter in EPA's files or any other indication that it was received by EPA prior to the date it was produced to the U.S. Department of Justice in 1989. Vista's president testified that he cannot recall ever seeing the purported Vista August 4, 1987 letter before 1989 when it was first produced to the U.S. Department of Justice.

33. Vista appears to have had no intention of ceasing its sale of non-compliant coatings in August 1987, where Vista's president announced to EPA at precisely the same time that Vista would continue its sales of non-compliant paint after September 1, 1987, and Vista in fact did so. Vista's president said that Vista would go bankrupt if it could not sell its non-compliant paint, a statement that again cannot be reconciled with Vista's purported August 1987 letter.

34. The United States propounded interrogatories and requests for production of documents on May 1, 1991, seeking this identical information requested by EPA in 1987. Vista responded with groundless objections with no legal basis, and flatly refused to provide the information or produce the relevant documents. The United States then brought a motion to compel Vista to comply with its discovery requests. As a result, this Court ordered that Vista first specifically identify by September 27, 1991 the quantity of its non-compliant coatings manufactured and sold in 1987, and second produce the requested documents at the U.S. Attorney's Office by no later than October 25, 1991, again mirroring the information requested by EPA in 1987.

35. Vista did not identify its non-compliant coatings with a verified response per this Court's Order and as

required by Section 114 of the Clean Air Act, but instead directed the United States to look through unidentified documents at its warehouse. Moreover, Vista has refused to make those documents available for inspection until October 25, 1991.

36. Vista has already provided its sworn response stating unequivocally that no documents exist regarding its sale or offer for sale of non-compliant coatings prior to August 30, 1987. *See* Vista's "Supplemental" Responses No. 2 and 3. This unexplained disappearance of Vista's documents is directly contrary to EPA's Section 114 requirement that Vista retain those documents.

37. Vista sworn responses to the United States' Requests for Admission ("RFA") cannot be reconciled with the deposition testimony of Vista's president, where he admits precisely the same facts that Vista denies in its RFA responses. For example, Vista's president admits that he knew that Vista was selling non-compliant coatings in September 1987. Fisher Depo. p. 188. *But see* Vista RFA No. 27. There are numerous other examples. *See* Vista RFA Nos. 1, 2, 3, 5, 6, 7. *See* especially Vista's evasive response to RFA No. 13, 14.

38. In the only information Vista has ever revealed about its sales of non-compliant paint in September 1987, Vista asserts that after September 1, 1987 it sold 35 gallons of non-compliant paint from one store, the identical store where SDCAPCD inspectors purchased non-compliant Vista paint after September 1, 1987. However Vista has never revealed the total sales of non-compliant paint in all of its San Diego stores after September 1, 1987, and pointedly has continued its pattern of obstruction and evasion in this litigation by refusing to admit even its sales of this 35 gallons of paint. *See* RFA No. 17 and Vista's response.

39. There is no genuine issue of material fact remaining in this case.

40. To the extent that any of the following Conclusions of Law are deemed to be uncontroverted facts, they are incorporated into these Statement of Uncontroverted Facts.

CONCLUSIONS OF LAW

1. This Court has subject matter jurisdiction over this action pursuant to Section 113(b) of the CAA, 42 U.S.C. § 9613(b), and 28 U.S.C. §§ 1331, 1345 and 1355, and personal jurisdiction over the parties herein.

2. Venue in this district is proper pursuant to 42 U.S.C. 7413 and 28 U.S.C. § 1391(c).

3. Liability for violations of Sections 101 and 114 of the federal Clean Air Act ("CAA"), 42 U.S.C. §§7410, 7414, is strict, pursuant to CAA Section 113, 42 U.S.C. § 7413.

4. Vista is a corporation covered by the CAA, 42 U.S.C. § 7602(e).

5. EPA satisfied the requirement that notice of this action be given to the appropriate State air pollution control agency pursuant to the CAA, 42 U.S.C. § 7413.

6. Vista illegally manufactured, offered for sale and sold non-compliant coatings a VOC content in excess of 250 g/l during the time period between and including December 3, 1985 through October 12, 1987 in violation of the State Implementation Plan rules identified as SCAQMD Rule 1113 and SDCAPCD Rule 67, and continued to violate those rules more than 30 days after having received a Notice of Violation from EPA on June 24, 1987.

7. Vista has therefore violated Section 110 and 113 of the Clean Air Act, 42 U.S.C. §§ 7410, 7414, from December 3, 1985 to October 12, 1987, a total of 578 days of violations, and there being no genuine issue of material fact remaining, the United States is entitled to summary judgment thereon.

8. Vista illegally and unreasonably failed to respond to EPA's June 19, 1987 request for relevant information in violation of Sections 113 and 114 of the CAA, 42 U.S.C. §§ 7413, 7414, by its failure to (a) establish and maintain records regarding their non-compliant coatings, (b) report the volume of non-compliant coatings sold in August-October 1987 and their location of sale; (c) report the name and VOC content of the coatings sold; and (d) report the identity of coatings manufactured by Vista from July-October 1987.

9. Vista has therefore violated Sections 113 and 114 of the Clean Air Act from August 26, 1987 to November 18, 1991, a total of 1177 days of violations, and there being no genuine issue of material fact remaining, the United States is entitled to summary judgment thereon.

10. Section 113 of the CAA, 42 U.S.C. § 7413(b), provides for imposition of a civil penalty against Vista of not more than $25,000 per day of violation for (1) the sale or offer of sale of non-compliant VOC paint in violation of CAA Section 110, and (2) for the failure to respond to EPA's request for information in violation of CAA Section 114. 42 U.S.C. § 7413(b)(2), (4). For purposes of computing the appropriate civil penalty, the penalty period begins when the source first commits the violation, and not later when the NOV is issued. This Court will first determine the maximum penalty allowable, and then consider any mitigating circumstances.

11. In determining the civil penalty, the court "should give effect to the major purpose of a civil penalty: deterrence. Civil penalties should be large enough to hurt, and to deter anyone in the future from shown as little concern as [defendant] did for the need to comply.

12. In assessing civil penalties, CAA Section 113 provides that the court shall take into consideration in addition to other factors "the size of the business, the

economic impact of the penalty on the business and the seriousness of the violation." 42 U.S.C. § 7413(b).

13. The first two factors, the size of Vista's business and the economic impact of the penalty on its business, support the imposition of a substantial penalty. Vista is a major manufacturer, distributor and retail seller of paint, with its total sales last year exceeding 50 million dollars. Vista owns its manufacturing facilities in Fullerton, California, its own stores in 15 different locations in California, and its own trucks and transportation facilities for its business operations. Imposition of the penalty assessed below would amount to less than eleven per cent of Vista's sales in a single year of operation.

14. The third factor, the seriousness of the violation, also supports a substantial penalty against Vista. After more than two years of illegally selling non-compliant coatings and after a Notice Of Violation, Vista continued to manufacture and sell its non-compliant coatings at a rate of 11,300 gallons per month. The excess VOC's added to the environment by manufacturing this paint are significant; by applying these non-compliant paints, the excess VOC's added to the environment above that permitted by law is approximately 16,000 lbs., or eight tons a month. During the total period between December 3, 1985, and October 12, 1987, the application of Vista paints has thereby added approximately 176 tons of excess VOC's to the environment over that permitted by law. Given the devastating effects on human health, vegetation and our environment of such unpermitted pollution, the potential harm of Vista's conduct is almost incalculable, where Vista has contributed to the injuries from air pollution suffered by the population of Los Angeles, Orange and San Diego Counties.

15. Vista's failure to respond to EPA's request for information is equally serious. More than four years after the information was requested by EPA, then by the U.S.

Department of Justice in this lawsuit, Vista has not yet responded to EPA's request that Vista specify the quantity of non-compliant paint manufactured and sold in the summer of 1987.

16. There is injury to the public when responsible parties such as Vista do not respond to official inquiries pertaining to its Clean Air Act compliance and liability. EPA must expend a significant portion of its limited monies to prosecute these actions, and the violator escapes effective regulation of its pollution by hiding its violation and challenging EPA to find the information on its own, if it can. Where the regulatory program is designed to protect public health, as with the Clean Air Act, it is even more important to deter violators.

17. Finally, in considering other factors bearing on Vista's penalty, Vista's conduct was calculated to violate the law, and was intentional, knowing, and in bad faith. Moreover, while other paint manufacturers accepted EPA's offer of leniency in exchange for their compliance with the law, Vista literally dared EPA to enforce the law, and then refused to disclose the evidence of its violations. Vista conduct has been consistent throughout this case, and establishes a pattern of knowing disregard for the law. Deterrence of Vista from the knowing, deliberate and calculated violation of the environmental laws requires imposition of these civil penalties.

18. The Court has considered all other mitigating factors, and has reduced Vista's civil penalty accordingly.

19. Regarding Vista's CAA Section 110 violations, the Court assesses a civil penalty of $1,000 per day for each of Vista's 468 days of violations from December 3, 1985 to June 24, 1987 (the date Vista received its Notice of Violation from EPA), and $12,500 per day for each of Vista's 110 days of violation from June 24, 1987 to October 12, 1987. The total CAA Section 110 civil penalty is $1,843,000.

20. Regarding Vista's CAA Section 114 violations, the Court assesses a civil penalty of $1,000 per day for each day of Vista's 1177 days of violation from August 26, 1987, the date Vista's first response to EPA's June 19, 1987 request for information was due, to November 18, 1991, the hearing date on the United States' summary judgment motion. The total CAA Section 114 civil penalty is $1,177,000.

21. In addition, Vista shall be required to pay the reasonable attorney's fees and expenses of the United States pursuant to Federal Rule Of Civil Procedure 37(c) in making its proof of the matters denied in Vista's Responses to Plaintiff's First Set Of Requests For Admissions, dated March 29, 1991, where (a) the requests were not held objectionable pursuant to Rule 36(a); (b) the admission sought was of substantial importance; (c) Vista had no reasonable ground for believing that it might prevail on the matter; and (d) there was no other good reason for Vista's failure to admit the matters presented.

22. To the extent that any of the foregoing Uncontroverted Facts are deemed to be conclusions of law, they are incorporated into these Conclusions of Law.

IT IS SO ORDERED.

Dated: Dec. 18, 1991.

/s/ Manuel L. Real
HON. MANUEL L. REAL
Chief United States District Judge

Presented by:

LOURDES G. BAIRD
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division
SCOTT PARK
Assistant United States Attorney

/s/ Peter Hsiao
PETER HSIAO
Assistant United States Attorney

Attorneys for Plaintiff
UNITED STATES OF AMERICA

APPENDIX E

UNITED STATES OF AMERICA
CENTRAL DISTRICT OF CALIFORNIA

No. CV-90-6449-R

UNITED STATES OF AMERICA,
Plaintiff,

v.

VISTA PAINT CORPORATION,
Defendant.

Date: February 3, 1992
Time: 10:00 a.m.

ORDER REGARDING DEFENDANT'S MOTION FOR FINDINGS OF FACT AND FOR RELIEF FROM AND AMENDMENT OF THE JUDGMENT

[Filed Feb. 10, 1992]

Defendant Vista Paint Corporation's ("Vista") Motion For Findings Of Fact And For Relief From And Amendment Of The Judgment came on regularly for hearing before the Court on February 3, 1992. Defendant's motion is denominated as one for reconsideration of this Court's prior entry of summary judgment against defendant. The Court has also previously ordered that Vista obtain a stay of execution of the judgment upon certain conditions, such stay to expire on February 3, 1992. After consideration of the moving and opposing papers, exhibits and pleadings, and all arguments submitted to the Court;

IT IS HEREBY ORDERED that:

1. Vista's Motion For Findings Of Fact And For Relief From And Amendment Of The Judgment is denied

in its entirety with prejudice, except as explicitly set forth below.

2. The Court approves and enters amended findings of fact and conclusions of law in the form submitted by the United States.

3. The United States is hereby stayed from executing upon the judgment under the identical conditions as previously imposed by this Court on Vista until February 7, 1992. After consideration of the papers filed in support and in opposition to Vista's prior request for a stay of execution of the judgment, the Court finds that any additional stay should be strictly governed by Fed. R. Civ. Proc. 62(d). Therefore, Vista may extend the stay of execution of plaintiff's judgment provided in this Order pursuant to Rule 62(d) only upon the condition that it post a supersedeas bond in the amount of $3,170,896.00, and that Vista deliver such bond to the Court along with an application for the Court's approval of the bond's amount and its terms of payment to the United States by no later than February 7, 1992.

DATED: 2-3, 1992.

/s/ Manuel L. Real
MANUEL L. REAL
Chief United States District Judge

Submitted by:

LOURDES G. BAIRD
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division
SCOTT H. PARK
Assistant United States Attorney

/s/ Peter Hsiao
PETER HSIAO
Assistant United States Attorney

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CV 90-6449-R

UNITED STATES OF AMERICA,
Plaintiff,

v.

VISTA PAINT CORPORATION,
Defendant.

Date: February 3, 1991
Time: 10:00 a.m.

AMENDED FINDINGS OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW IN SUPPORT OF UNITED STATES' MOTION FOR SUMMARY JUDGMENT

[Filed Feb. 11, 1992]

Plaintiff United States of America's motion for summary judgment came on regularly for hearing on November 18, 1991, Chief United States District Court Judge Manuel L. Real presiding. Subsequently, defendant's Motion For Findings Of Fact and For Relief From And Amendment Of The Judgment came on regularly for hearing on February 3, 1992. After having heard the arguments of counsel and examined the pleadings, memorandum and exhibits presented by the plaintiff and de-

fendants, the Court makes the following amended findings of fact and conclusions of law:

STATEMENT OF UNCONTROVERTED FACTS

1. Vista is a major manufacturer, distributor and retail seller of paint. It manufactures approximately 25,000 gallons of paint each month for sale at its stores in California, and its total sales last year exceeded 50 million dollars. Vista's general office and its sole paint manufacturing plant are located in Fullerton, California. Vista sells its paint at its own stores in Stanton, Costa Mesa, La Habra, Orange, Mission Viejo, Ontario, Riverside, El Cajon, Chula Vista, Huntington Beach, and San Diego, California.

2. In 1984, as part of the State Implementation Plan ("SIP") for California to limit the VOC content of paint, the South Coast Air Quality Management District ("SCAQMD") and the San Diego County Air Pollution Control District ("SDCAPCD") adopted SIP Rules 1113 and 67.0. These rules regulate non-flat architectural coatings, otherwise known as gloss or semi-gloss paints, which are commonly used to paint structures, mobile homes or pavement. In order to control air pollution from the manufacture and application of these coatings, the rules limit their VOC content to no more than 250 grams of VOC per liter of coating ("250 g/l VOC"), and forbid the sale, offer for sale, or application of any such paint exceeding these VOC limitations ("non-complaint coatings").

3. As background, local and regional government authorities under California law have primary responsibility for control of air pollution. Cal. Health & Safety Code § 40000 *et seq.* Two of these local authorities are the SCAQMD, which includes Los Angeles and Orange Counties, and the SDCAPCD, which includes San Diego County. These districts are empowered to adopt rules governing air pollution and to independently enforce them

as state law. Id. at § 40001. As for the federal government, the Clean Air Act ("CAA") provides the EPA with independent authority to enforce federally approved air pollution control laws. Section 110 of the Act, 42 U.S.C. § 7410, requires among other things that each State submit rules for emission limitations to be incorporated into the State Implementation Plan ("SIP"), and enforced as federal law by the EPA. *See* 42 U.S.C. 7413.

4. In 1985, the U.S. Environmental Protection Agency ("EPA"), pursuant to the CAA, approved SCAQMD Rule 1113 and SDCAPCD Rule 67.0 as part of the SIP for California, to be enforced as federal law. 50 Fed. Reg. 3338 (January 24, 1985).

5. Vista's president was aware of these rules and their purpose in the time period between 1985 to 1987, to control VOC emissions. Vista was both a long-time manufacturer and seller of non-compliant coatings, having produced its "Trim-Kote" and "Proformer" brands with VOC's in excess of 250 g/l for over 10 years. Vista offered these non-compliant coatings for sale for the five-year period preceding February 1987.

6. EPA met with industry trade associations in 1987, including the National Paint & Coatings Association and the Southern California Paint & Coatings Association, regarding its strategy for taking enforcement action against companies violating the 1985 VOC limitations set by law. EPA informed the industry that it would, as a matter of enforcement discretion, prioritize enforcement against those companies that did not cease the manufacture of non-compliant coatings by July 1, 1987 *and* who did not cease their sale of non-compliant coatings by September 1, 1987. Thus, while EPA retained the discretion to prosecute any company that violated the VOC limitation after January 24, 1985, EPA announced that those companies that persisted longest in their continuing violations of the Clean Air Act would be the first to be prosecuted.

7. On March 19, 1987, in order to determine the compliance status of the paint industry with the VOC limitations of federal law, EPA issued a request for information to a number of paint manufacturers, including Vista, pursuant to Section 114 of the CAA, 42 U.S.C. § 7414 ("Section 114 Request"). EPA required that each company report the volume of each non-architectural coating that it manufactured from February to May 1987, and the VOC content of each coating. Each company was given until April 7, 1987 to submit their first reports, and warned that non-compliance would subject them to civil penalties.

8. Vista did not respond to EPA's March 19 request. Vista's president cannot recall why Vista did not respond. Faced with Vista's recalcitrance, EPA subsequently issued an Administrative Order against Vista pursuant to Section 113(a)(3) of the CAA, finding that Vista had violated Section 114 of the CAA in failing to provide the requested information to EPA. 42 U.S.C. §§ 7413(a)(3), 7414. Per its Order, EPA directed Vista to disclose by no later than April 16, 1987 the VOC content of the architectural coatings that it manufactured or distributed from February through May 1987.

9. Vista only partially complied with EPA's Administrative Order, responding in a letter postmarked April 20, 1987 by disclosing the VOC content of the architectural coatings it manufactured in February and March 1987, only. Vista's letter disclosed that its monthly paint production was approximately 25,000 gallons of coatings, with 55 percent by volume of the identified coatings exceeding the 250 g/l VOC limitation of federal law. Vista did not respond to EPA's Order regarding its coatings manufactured in April and May, 1987, and did not provide the requested information.

10. EPA subsequently sought more specific information from the paint manufacturers regarding the trade name, volume and VOC content of each non-compliant

coating sold in each California air quality district in March, April and May 1987. On May 15, 1987, EPA sent Vista a modified request for more specific information to supplant its initial request for information. Alternatively, EPA specified that the paint manufacturer could stipulate that it sold and/or offered for sale coatings in violation of the 250 g/l VOC limitation, and the month and location where the non-compliant paint was sold. Vista was advised that a failure to provide the requested information would subject Vista to an enforcement action for civil penalties of $25,000 per day of violation.

11. Vista responded by a letter dated June 12, 1987. Without disclosing the months in which it sold non-compliant coatings, Vista admitted to selling non-compliant coatings in the SCAQMD and the SDCAPCD. Vista's president also confirmed Vista's prior admissions in his sworn deposition testimony. Yet the information regarding the volume of each such non-compliant Vista coating sold and the location of their sale was available to Vista in March, April and May of 1987.

12. Based upon Vista's admission, EPA issued a Notice of Violation of Vista on June 19, 1987 pursuant to Section 113(a)(1) of the CAA.

13. EPA, in its continuing effort to compel Vista to comply with the law, sent Vista a second Section 114 request on June 19, 1987, requesting documentation of any quantities of Vista non-compliant coatings manufactured and sold in the subsequent July-October 1987 period. This request required Vista to (1) establish and maintain records regarding their non-compliant coatings, (2) report the volume of non-compliant coatings sold in August-October 1987 and their location of sale; (3) report the name and VOC content of the coatings sold; and (4) report the identity of coatings manufactured by Vista from July-October 1987.

14. The information requested by EPA's June 19 Section 114 request was available to Vista at the time of

EPA's request. EPA again warned Vista at that time of the $25,000 per day penalty if the requested information was not received.

15. In an effort to further accommodate the paint industry and Vista, EPA by its letter dated July 22, 1987 modified its second Section 114 request with a strictly tailored condition. In this letter, EPA stipulated that if Vista would commit to (1) the cessation of the manufacture of non-compliant coatings by July 1, 1987, (2) the cessation of all sales of non-compliant coatings by September 1, 1987 (a condition never fulfilled by Vista, see below), and (3) disclose the time and location of sales of non-compliant paint in August 1987 (another condition never fulfilled by Vista), that Vista would be relieved of its obligation to provide the other information requested by EPA in its prior June 1987 letter. Vista was still required to maintain all relevant records of its manufacture and sale of non-compliant coatings. EPA was explicit, however, that all conditions must be strictly complied with if Vista was to be relieved of any of its reporting obligations.

16. Vista continued to manufacture, sell and offer for sale its non-compliant coatings throughout April to October 1987, but did not provide any reports to EPA. Vista continued to manufacture non-compliant coatings in April, May and June of 1987, and continued to sell and offer for sale its non-compliant coatings in the Los Angeles and San Diego areas throughout June, July, August and September 1987. Although Vista continued to sell non-compliant coatings, Vista submitted no report of its August sales as requested in EPA's July 22, 1987 letter, and no report as required by EPA's June 19, 1987 letter. EPA, per the CAA Section 113, 42 U.S.C. § 7413, gave notice to the appropriate State air pollution control agency of this enforcement action.

17. On August 19, 1987, Vista's president, Eddie R. Fisher, telephoned William Wruble of EPA Region IX

to ask for more time to sell his non-compliant coatings. After discussing Vista's situation, Mr. Fisher stated that "he had no choice but to sell the [non-compliant] paint past September 1, and was planning to do so." Mr. Fisher then stated that "he would (could) litigate if he had to, since the option was to go out of business."

18. Mr. Wruble denied Vista's request for additional time to sell its non-compliant coatings, and explained that Vista's failure to take EPA's enforcement authority seriously was not a reason to grant it additional time to sell non-compliant coatings. Mr. Fisher then said that he "didn't think it was our [EPA's] intention to put him in jail, although he'd be willing to pay a 'reasonable' fine to be able to continue to sell his violating coatings."

19. Vista was also warned by the local SDCAPCD to cease its sale of non-compliant coatings by September 1, 1987, a warning Vista received at least by July 28, 1987. Vista however continued to sell non-compliant coatings throughout September 1987. Vista admits that such non-compliant coatings remained offered for sale throughout Vista's San Diego stores in September 1987. Vista also continued its refusal to respond to EPA's request for information.

20. Further evidence that Vista sold non-compliant coatings after September 1, 1987 is provided where inspectors from the SDCAPCD purchased the Vista-brand "Trim-Kote" coating, a non-compliant coating, from Vista's retail outlet on Kearney Villa Road in San Diego, California, on September 2, 1987. The SDCAPCD's laboratory analysis revealed that the purchased paint had a VOC concentration of 387 g/l, well above the permissible 250 g/l permitted by SDCAPCD Rule 67.

21. The SDCAPCD inspectors purchased a second gallon of non-compliant coating, a Vista paint under the brand name "Proformer", from the same Vista San Diego store on September 22, 1987. The SCPAPCD's laboratory

analysis revealed that the purchased paint had a VOC concentration of 381 g/l, well above the permissible 250 g/l permitted by SDCAPCD Rule 67.

22. Both Vista's records and its president corroborate these violations. Vista's April 16, 1987 report to EPA identifies that its "Trim-Kote" and "Proformer" paints as non-compliant coatings, have a VOC concentration of 240 and 380 g/l, respectively. Vista's president confirmed that Vista's "Trim-Kote" and "Proformer" paints purchased by the SDCAPCD inspectors would be expected to have VOC concentrations in excess of 250 g/l. Mr. Fisher further admits that non-compliant coatings were sold in San Diego on September 2, 1987. Based upon these illegal sales, the SDCAPCD cited Vista with two misdemeanor Notices Of Violation for its violations of SDCAPCD Rule 67. Cal. Health & Safety Code § 42400.

23. Faced in September 1987 with enforcement action from the SDCAPCD (EPA had not yet taken its enforcement action against Vista), Vista sought a variance from the SDCAPCD Hearing Board.

24. As background, the variance procedure is a creation of the California Health & Safety Code §§ 42350 *et seq.*, and provides the applicant with a procedure to obtain relief from a *local* rule (not a federal rule) under certain strictly limited conditions. Cal. Health & Safety Code § 42350. In part, an applicant cannot obtain a variance unless the applicant attests that it "is, or will be, in violation of Section 41701 or of any rule, regulation, or order of the district." Cal. Health and Safety Code § 42352(a). Thus, by applying for a variance, Vista further admitted that it was in violation of SDCAPCD Rule 67 and/or its intent to violate that Rule for the express purpose of selling the remainder of Vista's non-compliant paints within the next 90 days.

25. Vista was subsequently unable to persuade a majority of the SDCAPCD Hearing Board at its September 24, 1987 hearing that a variance was warranted, and Vista obtained no variance relief at any time from the SDCAPCD. Vista applied to the SDCAPCD Hearing Board for reconsideration, then dropped its request. Vista represented instead that it had removed its non-compliant paint from its San Diego stores as of October 12, 1987, but after the September 24 variance hearing. Vista's president explains that he removed the non-compliant coating from his San Diego stores because those coatings were not selling well. Vista subsequently paid a fine to the SDCAPCD for its violations of their local rules.

26. Vista offered for sale a significant amount of non-compliant coatings in San Diego in September 1987. At the SDCAPCD Hearing Board September 24, 1987 hearing, Vista's president testified under oath, as required by Cal. Health & Safety Code § 40830, that 13,000 gallons of non-compliant paint remained in Vista's San Diego stores. Vista's president corroborated this admission when he told SDCAPCD inspector George Seidel prior to the hearing that during September 1987, Vista had 5200 gallons of non-compliant paint for sale in Vista's San Diego stores. Until Vista's variance was lost, Vista continued to offer this paint for sale in violation of the SIP.

27. The VOC's emitted by Vista's paint are a primary precursor of ozone, or smog, which the EPA has designated as a major air pollutant. 42 U.S.C. §§ 7408, 7450, 7451; 40 C.F.R. ¶¶ 50.1, 50.9. The 13,000 gallons of coating offered for sale in September 1987 in San Diego by Vista would release approximately eight tons of VOC hydrocarbons.

28. Ozone pollution causes serious adverse health effects, including coughing, reduced lung capacity, respiratory infection and possible permanent lung damage.

There is also evidence that the young, the elderly, and those persons with respiratory ailments (such as asthmatics) are among those who are particularly susceptible to the adverse effects of ozone. At certain concentration levels, ozone irritates the respiratory system and causes coughing, wheezing, chest tightness and headaches. Due to its irritation nature, ozone can aggravate asthma, bronchitis, and emphysema. Some studies indicate that chronic exposure to fairly low levels of ozone may reduce resistance to infection and alter blood chemistry or chromosome structure. At higher concentrations [of ozone], hospitalization becomes a possibility.

29. Ozone also causes significant damage to the environment, where ozone can destroy vegetation, reduce crop yield, and damage exposed materials by causing cracking, fading, and weathering. Moreover clear evidence shows that ozone damages economically, ecologically, and aesthetically important plants. When exposed to ozone, major annual crops produce reduced yields. Some tree species suffer injury to needles or leaves, lowered productivity, and in severe cases, individual trees can die.

30. EPA has through the federal Clean Air Act attempted to control and regulate VOC emissions from a variety of sources, including paint manufacturers. In 1987, EPA found that 40 paint companies, including Vista, were in violation of the federal Clean Air Act's limitation on VOC concentrations in their coatings. All 40 paint companies received a Notice Of Violation, and 38 announced their intent to cease non-compliant paint sales. Only one company announced its intent to continue to violate the VOC restrictions, to intentionally violate the law despite repeated warnings from the regulatory agencies, and to disregard the effects of its violations on human health and the environment: that company was Vista.

31. After EPA referred this matter to the U.S. Justice Department for enforcement action, Vista for the first time produced a letter it purportedly prepared on or about August 4, 1987 and sent to EPA, that represented that Vista had ceased its manufacture of non-compliant coatings on June 30, 1987, and "will not offer for sale any non-compliant coatings after September 1, 1987."

32. This representation has in fact proven to be false. Vista's president admits that sales of such coatings continued well after September 1, 1987. In addition, there is no copy of the letter in EPA's files or any other indication that it was received by EPA prior to the date it was produced to the U.S. Department of Justice in 1989. Vista's president testified that he cannot recall ever seeing the purported Vista August 4, 1987 letter before 1989 when it was first produced to the U.S. Department of Justice.

33. Vista appears to have had no intention of ceasing its sale of non-compliant coatings in August 1987, where Vista's president announced to EPA at precisely the same time that Vista would continue its sales of non-compliant paint after September 1, 1987, and Vista in fact did so. Vista's president said that Vista would go bankrupt if it could not sell its non-compliant paint, a statement that again cannot be reconciled with Vista's purported August 1987 letter.

34. The United States propounded interrogatories and requests for production of documents on May 1, 1991, seeking this identical information requested by EPA in 1987. Vista responded with groundless objections with no legal basis, and flatly refused to provide the information or produce the relevant documents. The United States then brought a motion to compel Vista to comply with its discovery requests. As a result, this Court ordered that Vista first specifically identify by September 27, 1991 the quantity of its non-compliant coatings manufactured and

sold in 1987, and second produce the requested documents at the U.S. Attorney's Office by no later than October 25, 1991, again mirroring the information requested by EPA in 1987.

35. Vista did not identify its non-compliant coatings with a verified response per this Court's Order and as required by Section 114 of the Clean Air Act, but instead directed the United States to look through unidentified documents at its warehouse. Moreover, Vista has refused to make those documents available for inspection until October 25, 1991.

36. Vista has already provided its sworn response stating unequivocally that no documents exist regarding its sale or offer for sale of non-compliant coatings prior to August 30, 1987. *See* Vista's "Supplemental" Responses No. 2 and 3. This unexplained disappearance of Vista's documents is directly contrary to EPA's Section 114 requirement that Vista retain those documents.

37. Vista sworn responses to the United States' Requests for Admission ("RFA") cannot be reconciled with the deposition testimony of Vista's president, where he admits precisely the same facts that Vista denies in its RFA responses. For example, Vista's president admits that he knew that Vista was selling non-compliant coatings in September 1987. Fisher Depo. p. 188. *But see* Vista RFA No. 27. There are numerous other examples. *See* Vista RFA Nos. 1, 2, 3, 5, 6, 7. *See* especially Vista's evasive response to RFA No. 13, 14.

38. In the only information Vista has ever revealed about its sales of non-compliant paint in September 1987, Vista asserts that after September 1, 1987 it sold 35 gallons of non-compliant paint from one store, the identical store where SDCAPCD inspectors purchased non-compliant Vista paint after September 1, 1987. However, Vista has never revealed the total sales of non-compliant paint in all of its San Diego stores after Sep-

tember 1, 1987, and pointedly has continued its pattern of obstruction and evasion in this litigation by refusing to admit even its sales of this 35 gallons of paint. *See* RFA No. 17 and Vista's response.

There is no genuine issue of material fact remaining in this case.

40. To the extent that any of the following Conclusions of Law are deemed to be uncontroverted facts, they are incorporated into these Statement of Uncontroverted Facts.

CONCLUSIONS OF LAW

1. This Court has subject matter jurisdiction over this action pursuant to Section 113(b) of the CAA, 42 U.S.C. § 9613(b), and 28 U.S.C. §§ 1331, 1345 and 1355, and personal jurisdiction over the parties herein.

2. Venue in this district is proper pursuant to 42 U.S.C. 7413 and 28 U.S.C. § 1391(c).

3. Liability for violations of Sections 110 and 114 of the federal Clean Air Act ("CAA"), 42 U.S.C. §§ 7410, 7414, is strict, pursuant to CAA Section 113, 42 U.S.C. § 7413.

4. Vista is a corporation covered by the CAA, 42 U.S.C. § 7602(e).

5. EPA satisfied the requirement that notice of this action be given to the appropriate State air pollution control agency pursuant to the CAA, 42 U.S.C. § 7413.

6. Vista illegally offered for sale and sold non-compliant coatings a VOC content in excess of 250 g/l during the time period between and including December 3, 1985 through October 12, 1987 in violation of the State Implementation Plan rules identified as SCAQMD Rule 1113 and SDCAPCD Rule 67, and continued to violate those rules more than 30 days after having received a Notice of Violation from EPA on June 24, 1987.

7. Vista has therefore violated Section 110 and 113 of the Clean Air Act, 42 U.S.C. §§ 7410, 7414, from December 3, 1985 to October 12, 1987, a total of 578 days of violations, and there being no genuine issue of material fact remaining, the United States is entitled to summary judgment thereon.

8. Vista illegally and unreasonably failed to respond to EPA's June 19, 1987 request for relevant information in violation of Sections 113 and 114 of the CAA, 42 U.S.C. §§ 7413, 7414, by its failure to (a) establish and maintain records regarding their non-compliant coatings, (b) report the volume of non-compliant coatings sold in August-October 1987 and their location of sale; (c) report the name and VOC content of the coatings sold; and (d) report the identity of coatings manufactured by Vista from July-October 1987.

9. Vista has therefore violated Sections 113 and 114 of the Clean Air Act from August 26, 1987 to November 18, 1991, a total of 1177 days of violations, and there being no genuine issue of material fact remaining, the United States is entitled to summary judgment thereon.

10. Section 113 of the CAA, 42 U.S.C. § 7413(b), provides for imposition of a civil penalty against Vista of not more than $25,000 per day of violation for (1) the sale or offer for sale of non-compliant VOC paint in violation of CAA Section 110, and (2) for the failure to respond to EPA's request for information in violation of CAA Section 114. 42 U.S.C. § 7413(b)(2), (4). For purposes of computing the appropriate civil penalty, the penalty period begins when the source first commits the violation, and not later when the NOV is issued. This Court will first determine the maximum penalty allowable, and then consider any mitigating circumstances.

11. In determining the civil penalty, the court "should give effect to the major purpose of a civil penalty: deterrence. Civil penalties should be large enough to hurt, and

to deter anyone in the future from shown as little concern as [defendant] did for the need to comply.

12. The CAA was amended in November 1990, in part, to add new CAA Section 113(e)(1), 42 U.S.C. § 7413(e)(1). In assessing civil penalties, CAA Section 113(e)(1) provides that the Court shall consider (1) the size of the business; (2) the economic impact of the penalty on the business; (3) the seriousness of the violation; (4) the violator's full compliance history and good faith efforts to comply; (5) the duration of the violation as established by any credible evidence; (6) payment by the violator of penalties previously assessed for the same violation; (7) the economic benefit of noncompliance, and such other factors as justice may require.

13. The first two factors, the size of Vista's business and the economic impact of the penalty on its business, support the imposition of a substantial penalty. Vista is a major manufacturer, distributor and retail seller of paint, with its total sales last year exceeding 50 million dollars. Vista owns its manufacturing facilities in Fullerton, California, its own stores in 15 different locations in California, and its own trucks and transportation facilities for its business operations. Imposition of the penalty assessed below would amount to approximately six per cent of Vista's sales in a single year of operation.

14. The third factor, the seriousness of the violation, also supports a substantial penalty against Vista. After more than two years of illegally selling non-compliant coatings and after a Notice Of Violation, Vista continued to manufacture and sell its non-compliant coatings at a rate of 11,300 gallons per month. The excess VOC's added to the environment by manufacturing this paint are significant; by applying these non-compliant paints, the excess VOC's added to the environment above that permitted by law is approximately 16,000 lbs, or eight tons a month. During the total period between December 3, 1985 and October 12, 1987, the application of Vista

paints has thereby added approximately 176 tons of excess VOC's to the environment over that permitted by law. Given the devastating effects on human health, vegetation and our environment of such unpermitted pollution, the potential harm of Vista's conduct is almost incalculable, where Vista has contributed to the injuries from air pollution suffered by the population of Los Angeles, Orange and San Diego Counties.

15. Vista's failure to respond to EPA's request for information is equally serious. More than four years after the information was requested by EPA, then by the U.S. Department of Justice in this lawsuit, Vista has not yet responded to EPA's request that Vista specify the quantity of non-compliant paint manufactured and sold in the summer of 1987.

16. There is injury to the public when responsible parties such as Vista do not respond to official inquiries pertaining to its Clean Air Act compliance and liability. EPA must expend a significant portion of its limited monies to prosecute these actions, and the violator escapes effective regulation of its pollution by hiding its violation and challenging EPA to find the information on its own, if it can. Where the regulatory program is designed to protect public health, as with the Clean Air Act, it is even more important to deter violators.

17. The fourth and fifth factors, the violator's full compliance history, good faith efforts to comply, and the duration of the violation as established by any credible evidence, also supports a substantial penalty against Vista. Vista's CAA violations were persistent evidence an extended history of deliberate non-compliance. *See, e.g.* Conclusion Of Law ¶¶ 7, 9. Vista's conduct was calculated to violate the law, and was intentional, knowing. and in bad faith. Moreover, while other paint manufacturers accepted EPA's offer of leniency in exchange for their compliance with the law, Vista literally dared EPA

to enforce the law, and then refused to disclose the evidence of its violations. Vista conduct has been consistent throughout this case, and establishes a pattern of knowing disregard for the law. Deterrence of Vista from the knowing, deliberate and calculated violation of the environmental laws requires imposition of these civil penalties.

18. The sixth factor, the payment by the violator of penalties previously assessed for the same violation, has been considered, where Vista has made no prior payment to plaintiff for its violations of federal law, and where it has made a $500.00 payment on a $2000.00 penalty imposed by the San Diego Air Pollution Control District for Vista's violations of its Rule 67.0 occurring on September 2 and 22, 1987.

19. The seventh factor, the economic benefit of noncompliance, also supports a substantial penalty against Vista. By its failure to properly respond to EPA's Section 114 requests for information or to the United States' discovery in this case, Vista has improperly failed to disclose information which it has or had in its exclusive possession to assess the precise economic benefit to it due to its illegal offer for sale and sale of non-compliant coatings. Based upon the record before the Court as detailed in the Court's Findings Of Fact, the Court concludes that Vista obtained a significant economic benefit from its illegal offer for sale and sales of non-compliant coatings. See Findings Of Fact ¶¶ 1, 9. Moreover, Vista has failed to submit admissible evidence to controvert the United States' showing of Vista's significant economic benefit.

20. The Court has considered all other mitigating factors, and has reduced Vista's civil penalty accordingly.

21. Regarding Vista's CAA Section 110 violations, the Court assesses a civil penalty of $1,000 per day for each of Vista's 468 days of violations from December 3, 1985 to June 24, 1987 (the date Vista received its Notice of Violation from EPA), and $12,500 per day for each

of Vista's 110 days of violation from June 24, 1987 to October 12, 1987. The total CAA Section 110 civil penalty is $1,843,000.

22. Regarding Vista's CAA Section 114 violations, the Court assesses a civil penalty of $1,000 per day for each day of Vista's 1177 days of violation from August 26, 1987, the date Vista's first response to EPA's June 19, 1987 request for information was due, to November 18, 1991, the hearing date on the United States' summary judgment motion. The total CAA Section 114 civil penalty is $1,177,000.

23. In addition, Vista shall be required to pay the reasonable attorney's fees and expenses of the United States pursuant to Federal Rule Of Civil Procedure 37(c) in making its proof of the matters denied in Vista's Responses to Plaintiff's First Set Of Requests For Admissions, dated March 29, 1991, where (a) the requests were not held objectionable pursuant to Rule 36(a); (b) the admission sought was of substantial importance; (c) Vista had no reasonable ground for believing that it might prevail on the matter; and (d) there was no other good reason for Vista's failure to admit the matters presented.

24. To the extent that any of the forgoing Uncontroverted Facts are deemed to be conclusions of law, they are incorporated into these Conclusions of Law.

IT IS SO ORDERED.

Dated: Feb. 11, 1992

/s/ Manuel L. Real
HON. MANUEL L. REAL
Chief United States District Judge

Presented by:

LOURDES G. BAIRD
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division
SCOTT PARK
Assistant United States Attorney

/s/ Peter Hsiao
PETER HSIAO
Assistant United States Attorney

Attorneys for Plaintiff
United States of America

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-55160
D.C. No. CV-90-6449-R

UNITED STATES OF AMERICA,
Plaintiff,

v.

VISTA PAINT CORPORATION,
Defendant.

VISTA PAINT CORPORATION,
Counterclaimant-Appellant,

v.

UNITED STATES OF AMERICA,
Counterdefendant-Appellee.

VISTA PAINT CORPORATION,
Third-Party Plaintiff-Appellant,

v.

ENVIRONMENTAL PROTECTION AGENCY; SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT; SAN DIEGO AIR-POLLUTION CONTROL DISTRICT; AIR RESOURCES BOARD; TECHNICAL REVIEW GROUP;
Third-Party Defendants-Appellees.

ORDER

[Filed Feb. 17, 1993]

Before: TANG and HALL, Circuit Judges, and WALKER,* District Judge

Appellees' petition for rehearing is hereby DENIED.

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* The Honorable Vaughn R. Walker, United States District Court Judge for the Northern District of California, sitting by designation.

APPENDIX H

UNITED STATES OF AMERICA
FOR THE NINTH CIRCUIT

No. 92-55160

D.C. No. CV-90-6449-R

UNITED STATES OF AMERICA,
Plaintiff,

v.

VISTA PAINT CORPORATION,
Defendant.

VISTA PAINT CORPORATION,
Counterclaimant-Appellant,

v.

UNITED STATES OF AMERICA,
Counterdefendant-Appellee.

VISTA PAINT CORPORATION,
Third-Party Plaintiff-Appellant,

v.

ENVIRONMENTAL PROTECTION AGENCY; SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT; SAN DIEGO AIR POLLUTION CONTROL DISTRICT; AIR RESOURCES BOARD; TECHNICAL REVIEW GROUP;
Third-Party Defendants-Appellees.

ORDER

[Filed Mar. 22, 1993]

Before: TANG and HALL, Circuit Judges, and WALKER,* District Judge.

The panel has voted to deny appellant's petition for partial rehearing. Judges Tang and Hall have voted to reject the suggestion for partial rehearing en banc and Judge Walker has so recommended.

The full court has been advised of the suggestion for partial rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for partial rehearing is DENIED and the suggestion for partial rehearing en banc is REJECTED.

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* The Honorable Vaughn R. Walker, United States District Court Judge for the Northern District of California, sitting by designation.